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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN J. VITALE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

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30 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the United States Court of Appeals for the Eighth Circuit erred in its opinion, dated March 9, 1984, affirming the judgment of the United States District Court of Missouri, Eastern District of Missouri, of conviction of Petitioner in violation of 21 U.S.C. Section 841, 846 (1981) on two counts, in that:

A. Substantial evidence was introduced at trial in violation of the Massiah Doctrine announced by this court in *U.S.* v. *Massiah* (*Massiah* v. *U.S.*, 377 U.S. 201), and in violation of Defendant's Sixth Amendment Constitutional Rights.

B. The Appellate Court wrongfully upheld rulings of the trial court allowing evidence in violation of the Massiah Doctrine, supra. The Appellate Court based its ruling on procedural rules stating that Defendant's failure to object at trial precluded the point on appeal.

C. The Appellate Court further wrongfully ruled that pre-trial motions seeking to suppress such Massiah evidence were insufficient to preserve the point through trial and into appeal, ignoring this court's prior decisions, including *Lawn* v. *U.S.*, 355 U.S. 399, and other Appellate Circuit decisions that indicate pre-trial motions properly preserve such a point on appeal.

II

II.

Whether the United States Court of Appeals for the Eighth Circuit erred in its opinion, dated March 4, 1984, affirming the judgment of the United States District Court, Eastern District of Missouri, of conviction of Petitioner of violation of 21 U.S.C. Section 841, 846 (1981) on two counts in that:

A. The Appellate Court upheld the Trial Court's order denying or withholding Brady material (*Brady* v. *Maryland,* 373 U.S. 83) until the Friday before trial, including both the name of a confidential informant and the statement of that witness.

B. Said ruling and the upholding of same deprived Defendant of evidence that would have been favorable to Defendant in that Defendant could have effectively negated said evidence at trial had he been properly and timely given such information. The deliberate withholding of same until immediately before trial violated Defendant's due process rights under the Fourteenth Amendment. The trial court's rulings allowing such procedure caused prejudice to the substantial rights of the Petitioner.

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JOHN J. VITALE,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

vs.

JOHN J. VITALE, APPELLANT, NO. 83-1416

John J. Vitale, your Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals, Eighth Circuit, entered in the above-entitled cause on February 29, 1984. Petition for Rehearing was denied March 27, 1984.

OPINIONS BELOW

This case was originally tried by jury in the United States District Court of Missouri, Eastern District, and a verdict was rendered therein on March 2, 1983. Sentence was pronounced by the Honorable Judge James Meredith on March 18, 1983. Appeal from said sentence was taken to the

Eighth Circuit Court of Appeals. No opinions or orders were entered into by the Trial Court.

Subsequently the cause was decided by the United States Court of Appeals for the Eighth Circuit on February 29, 1984, see Appendix "A."

A Petition for Rehearing, or in the Alternative, Motion for Rehearing En Banc was timely filed with the United States Court of Appeals, Eighth Circuit, and the same was denied on March 27, 1984, see Appendix "B."

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered into on February 29, 1984. The order of the United States Court of Appeals for the Eighth Circuit denying Petitioner's Motion for Rehearing, or in the Alternative Motion for Rehearing En Banc was entered on March 27, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), and Rule 17, et seq. of the Rules of this Court.

RELEVANT STATUTES

Title 21, U.S.C. Section 841.

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

Title 21, U.S.C. Section 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

John J. Vitale was charged by the Federal Grand Jury in St. Louis, Missouri on two counts. The first count charged that on 8/16/82, the Defendant did knowingly and intentionally distribute approximately two ounces of cocaine, in the Eastern District of Missouri, said cocaine being a schedule II narcotic drug, all in violation of Title 21, U.S.C. Section 841(a)(1). The second count charged that Defendant on 8/16/82, in the Eastern District of Missouri, knowingly and willfully combined, conspired, confederated and agreed with one Robert Brunner, not indicted, to distribute cocaine, a schedule II narcotic drug controlled substance in violation of Title 21, U.S.C. Section 841(a)(1) and 846.

Trial was had by jury on the 1st and 2nd day of March, 1983 in the Eastern Division of the United States District Court, Eastern District of Missouri, before the Honorable James H. Meredith, Judge. Defendant-Petitioner was found guilty by the jury on both counts. Sentencing was held on March 18, 1983, and the Defendant was sentenced to ten years on Count I, plus an additional special parole term of ten years to begin at the conclusion of ten years. On the second count, the Defendant was sentenced to ten years to run concurrently with Count I.

The sentence was appealed to the United States Court of Appeals for the Eighth Circuit, and said Court handed down its opinion affirming the sentence on February 29, 1984. Defendant filed a Motion for Rehearing or Rehearing by the Court En Banc. Said Motion was denied by the Appellate Court on March 27, 1984.

The facts presented at trial favorable to the Government and relevant to this Petition are:

Sergeant Wagner of the St. Louis Police Department assigned to the Drug Enforcement Administration Task Force (D.E.A.) had obtained the services of one Ron Hanna as an informant. Hanna in turn had been in contact with a Robert Brunner and Hanna had been attempting to sell some ten or twenty pounds of hashish to Brunner (not directly related to the offense charged).

On August 16, 1982 the residence of Brunner was under surveillance in anticipation of an exchange between Hanna and Brunner. Lacking activity, the police called Hanna from a phone in the police car to find out what was going on. Hanna called Brunner. Brunner told Hanna that he couldn't talk because his "coke" man was there, A pass by the residence by two police cars determined a Mercury automobile registered to Defendant was in the driveway.

Brunner had been contacted earlier in the evening at a restaurant by the Defendant. He told the Defendant to meet him at his residence. Brunner testified that Hanna had been asking him for cocaine and that he knew Defendant was sitting on two to four ounces of cocaine. Brunner further testified that he had lent the Defendant some $6,000.00 the day before and that when Defendant came to his residence, Defendant gave him two ounces of cocaine. Further, that they set a price of $2,100.00 a piece on the two bags offsetting some of the money owed. Defendant left Brunner's home. Around 11:00 p.m. Brunner phoned Defendant to advise that the quality of the cocaine was poor. He told Defendant not to worry about it since the drug was not for his consumption. The phone call was verified by phone records, but not by a recording

The next day, August 17, 1982, Brunner delivered ten pounds of hashish to Hanna, and informed him that he would sell Hanna some cocaine provided Hanna paid him

$1,000.00 that he owed to him. Hanna agreed to the same and contacted the D.E.A. When Brunner went to meet Hanna to make the exchange, he was arrested. Shortly after his arrest, he, like Hanna, agreed to become an informant.

The following day, August 18, 1982, at the behest of the D.E.A., Brunner called the Defendant and taped a conversation. Brunner asked Defendant if he had any more "C." Defendant asked if he had gotten rid of the other two. Brunner said yes and said he wanted more. Defendant advised he had no more but was waiting on some. Other taped calls were made, all of which were negative and not directly in evidence.

A month later on September 16, 1982, the Defendant was indicted on the August 16, 1982 transaction at the Brunner residence. The indictment was based on the taped phone conversation and Brunner's testimony.

On September 20, 1982, one Neal Spencer was arrested based on information given by Brunner. After his arrest, he, too, agreed to become an informant for the D.E.A. Spencer was known to the Defendant. The D.E.A. knew of the connection between Spencer and the Defendant. Spencer agreed to give his one hundred percent cooperation to the D.E.A.

Spencer testified that Defendant had contacted him several times subsequent to his (Spencer's) arrest. The arrest was, of course, unkn wn to the Defendant. Some time in November, 1982 Spencer met with Defendant at a bar. The two got into Defendant's pickup and took a drive. Spencer testified that Defendant told him that he was going to beat the case against him because no one saw him deliver the cocaine and that Brunner would be the last to turn him in—also that the best way to deal in drugs would be to do it on a one-to-one basis, and not to use the phone.

The Defendant and his wife testified. The essence of their testimony was that Defendant denied delivering or selling cocaine. He indicated that he was at Brunner's home on the 16th and that he had gone there to purchase some guns. He saw that they were Uzi submachine guns and declined to buy them since he assumed they were stolen. He also testified having first met Spencer at Brunner's home.

Spencer was re-called as a rebuttal witness. He testified that he first met Vitale (Defendant) at a restaurant where marijuana was discussed. He also claimed to have seen an Uzi machine gun at the Defendant's residence.

REASONS FOR GRANTING THE WRIT

I.

The reason why this Court should grant this Petition for Writ of Certiorari is that the United States Court of Appeals, Eighth Circuit, has decided this case in violation of the dictates of this Court.

The Appellate Court in its opinion admits the well established law under *Massiah* v. *United States,* 377 U.S. 201, 206 (1964), to the effect that Government agents cannot deliberately elicit incriminating statements from an accused after he has been indicted, in the absence of an attorney, because to do so would violate the Defendant's Sixth Amendment right to counsel. *See also, United States* v. *Criswell,* 696 F.2d 636, 639, an Eighth Circuit case involving the same issue.

Thus, the Appellate Court recognizes the doctrine brought to its attention at trial and on appeal. The same issue and law have been called not only to the Appellate Court's attention, but to the Trial Judge.

The Appellate Court seems to have accepted the fact that the witness Spencer was indeed an agent of the Government who had testified to statements made by the Defendant after he had been indicted and in the absence of his attorney.

There is no question that those statements were used in evidence and were of an incriminating and substantial nature. The Appellate Court indicates that the evidence shows the Appellant volunteered the statements and that there was doubt as to whether they were "deliberately elicited." In this the Court is wrong. The evidence was that the D.E.A. directed Spencer to Defendant. Further, that Defendant had contacted the informant by phone several

times, but, the evidence goes on to state that they had met one time at a tavern. There was no evidence of Defendant setting up the meeting. There was discussion between the two relative to the case, but there was no evidence that Defendant wanted to or did volunteer information on the case to the informant. All reasonable inferences would be that the informant was giving the Government his one hundred percent cooperation. This "aside" from the Court (concluding only voluntary, spontaneous statements of Defendant) is not warranted by the evidence, and we claim that the Government agent deliberately elicited incriminating statements from the Defendant after he had been indicted and in the absence of his attorney. It was the "intent" of the police to have the informant obtain statements from Defendant.

The Court did not decide the point directly on that issue. Instead it chose to evade the point of substantive law and decided it on prccedural law. The Court ruled that the point had not been properly preserved for appeal because no objection was made to the admission of the testimony at trial, citing Fed. R. Evid. 103 and *United States* v. *Wagoner,* 713 F.2d 1371, 1376 (8th C.C.A. 1983). Appellate counsel was not trial counsel. The Court is correct in stating that no objection was made to specific evidence, however, as noted below, the evidence had been objected to by pre-trial motion. The Appeals Court further refused to review the matter as plain error, citing Fed. R. Crim. P. 52(b) and *U. S.* v. *Price,* 464 F.2d 1217, 1219 (8th C.C.A.), *cert. denied* 409 U.S. 1040 (1972).

We argue that the Appellate Court uses an improper interpretation of *Massiah,* supra. The Court states as a constitutional principle that (p. 205), "Any secret interrogation of the Defendant, from and after the indictment, without the protection afforded by presence of counsel,

contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime." This constitutional principle rises above procedure, and where a violation is shown, it is the Court's duty to examine the matter on the point raised and to decide the matter on the basis of established case law and the constitutional rights of the individual defendant. The Appellate Court should have decided that a constitutional infringement of Defendant's rights had taken place.

It is further argued that the Defendant did indeed object at length by pre-trial motion to the evidence adduced. The Trial Court overruled said motions. The Appeals Court decision overlooks and ignores this facet and in so doing ignores decisions of this Court and Courts of other Appellate Courts and contradicts the same.

In *Lawn* v. *U.S.*, 355 U.S. 339, this Court stated the general rule that the overruling of a pre-trial motion to suppress the use at trial of particular evidence preserves the point and renders it unnecessary again to object when such evidence is offered at trial. *See also, Cogen* v. *U.S.*, 278 U.S. 221.

This same interpretation has been placed on this point by other Appellate Courts of different circuits. *See, Seehe* v. *Southern Pacific Transportation Co.*, 631 F.2d 649 (9th C.C.A.). Indeed, we had understood the same to apply to the Eighth Circuit. See footnote in *U.S.* v. *Criswell,* 696 F.2d 631 (8th C.C.A.). The ruling by a Trial Court that overrules pre-trial objections to specific evidence as was done here, should be regarded as sufficient under the law to preserve the point on appeal. Such a ruling by a Trial Court puts severe limitations upon trial counsel and subjects him and his client to a situation of harassment and the obvious (to the jury) displeasure of the Court should he continue to make repeated objections to evidence in the

course of trial, that the Trial Court is obviously going to overrule and allow into evidence. The law does not require useless acts, and the law cannot demand that a criminal defendant demean himself before a jury. The Appellate Court should have followed the general rule of case law and found that the motions preserved the point on appeal, and should have decided the point on its substantive merit and not on procedure.

II.

The second reason why the Court should grant the Petition for Writ of Certiorari is that the United States Court of Appeals, Eighth Circuit, has decided this case contrary to prior procedural rulings of this Court relative to discovery.

The Defendant had sought in proper form and time, a list of all prospective prosecution witnesses, and specifically witnesses who had agreements with the Government. This request was made prior to the statements testified to by informant Spencer. Spencer had been arrested in September and had discussed his personal position with Government attorneys handling this case. He was fully known to them. Because of delay by prosecutors in providing information on witnesses, Defendant forced the issue, and a hearing was held before a federal magistrate. The magistrate ruled that full disclosure had to be made relative to witnesses, but only four days before trial. The Government later contended that it did not become aware of the Spencer conversation, that is the substance of any statement that that particular witness might have given, until four days before trial, at which time a transcript of the conversation between he and Vitale was turned over to Defendant. The Appellate Court naively assumes this to be true. Spencer was known to the Government attorneys since September,

1982. The trial was held March 1 and 2 of 1983. The disclosure of the name of the witness and his statement was made on a Friday before the trial—on the following Tuesday.

It has been Defendant's position that this activity is a violation of procedure and was of such proportion to become a substantive due process issue in that such action by Government attorneys deliberately deprived Defendant of information beneficial to him, that he was entitled to, and that the refusal and withholding of same constituted a violation of his Fourteenth Amendment due process rights.

Defendant relied principally on *Brady* v. *Maryland,* 373 U.S. 83, to establish his point on appeal. The Appellate Court acknowledges *Brady,* but indicates that compliance four days before trial meets the test of *Brady.* We totally disagree.

We had cited many cases such as *Giglio* v. *U.S.,* 405 U.S. 150, and a case from the Eighth Circuit itself, *U.S.* v. *Librach,* 520 F.2d 550 (8th C.C.A. 1975), all of which indicated that there is a positive duty on the Government to comply with the rules and with such requests, and that the failure to do so will result in reversible error.

The Appellate Court uses the case of *U.S.* v. *Crow Dog,* 532 F.2d 1182 (8th Cir. 1976), *cert. denied,* 430 U.S. 929 (1977), to state that error of the District Court in administrating discovery rules is reversible error only if error is shown to prejudice the substantial rights of the Defendant. The Court goes on to say the District Court balanced the competing interest of providing the Defendant with the information needed for a full defense, against the need to protect the Government witness. We add that there was not one iota of evidence of possible harm to the Government witness. At the hearing before the magistrate in November, the U.S. Attorney so admitted.

We state that there was an absolute deliberate disregard of procedure by the Government shown on the face of the record. We state that there was no justification for the Appellate Court's refusal to admit that this was an abuse of discretion. The Appellate Court is wrong in claiming possible danger to a witness. There was no such evidence in the record. The only evidence in the record indicated to the contrary. The Appellate Court should have ruled that the failure to provide the information, just four days before trial, was an abuse of discretion.

The question of timing is essential. You cannot give counsel information on a primary point on a major case on a Friday before trial and expect him to be able to determine the validity of the information by the following Monday. Defendant was unable to obtain evidence to refute such testimony within the time frame allowed, and the spirit of *Brady* was ignored, as was the letter of *Brady,* all to the prejudice of the Defendant.

CONCLUSION

WHEREFORE, it is respectfully requested that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that Charles M. Shaw, Shaw, Howlett & Schwartz, Attorneys for Petitioner herein, have served upon the following, three copies of the above Petition for a Writ of Certiorari: Solicitor General, Department of Justice, Washington, D.C. 20530; Thomas E. Dittmeier, United States Attorney, 1114 Market Street, St. Louis, Missouri 63101; Clerk, U.S. Court of Appeals for the Eighth Circuit, U.S. Court and Customs House, 1114 Market St., St. Louis, Mo 63101.

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals, Eighth Circuit, of February 29, 1984, in UNITED STATES V. JOHN J. VITALE.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1416

United States of America, *Appellee,* v. John J. Vitale, *Appellant.*	**Appeal from the United States District Court for the Eastern District of Missouri**

Submitted: December 12, 1983

Filed: February 29, 1984

Before HEANEY, ROSS and FAGG, Circuit Judges.

ROSS, Circuit Judge.

John J. Vitale was indicted by a grand jury for distributing, and conspiring to distribute, two ounces of cocaine in violation of 21 U.S.C. §§ 841, 846 (1981). The defendant was tried before a jury and found guilty on both counts of the indictment. The district court[1] sentenced

[1] The Honorable James H. Meredith, United States District Judge for the Eastern District of Missouri.

Vitale to ten years imprisonment on each count, with the sentences to run concurrently, and imposed a ten year special parole term. The defendant appeals his conviction alleging that several errors were committed by the district court. For the reasons stated herein, we affirm the conviction.

Facts

In August 1982, Ron Hannah, a confidential informant for the Drug Enforcement Administration Task Force (DEA), contacted Robert Bruner and requested to purchase some cocaine. Subsequently, Bruner spoke to the defendant, Vitale, who informed him that he had two to four ounces of cocaine.

Later that evening Bruner received a call from Hannah, the DEA informant. Bruner told Hannah that he couldn't talk because his "coke man" was there. As a result of this statement two DEA officers surveilled Bruner's residence, and saw a Mercury Marquis that was registered to the defendant.

After the call, the defendant left Bruner's home. Bruner tested some of the cocaine and discovered it was of poor quality. He telephoned Vitale at 11:00 p.m. to notify him of the problem, but told the defendant not to worry because the drugs were not for his personal consumption. The call was verified by Continental Telephone Company records.

The next day Bruner delivered ten pounds of hashish to Hannah, and informed him that he would sell him the cocaine, provided Hannah paid off an outstanding $1,000 debt. Hannah agreed to come up with the money. When Bruner went to make the exchange he was arrested. Subsequently, he agreed to cooperate with the DEA by becoming an informant.

On August 18, 1982, Bruner telephoned Vitale and asked if he had "any more C," referring to cocaine. The defendant asked Bruner whether he had gotten rid of the other two ounces. Bruner responded affirmatively and told Vitale that he just wanted to know if he could get more. The defendant then said "not right now, I'm waiting on some."

On September 16, 1982, the defendant was indicted for the August 16 transaction, based upon Bruner's testimony, and the recorded telephone conversation.

On September 20, 1982, Neal Spencer was also arrested as a result of Bruner's cooperation with the government. After his arrest, he too agreed to cooperate with the DEA.

In November 1982, Spencer was contacted by the defendant who wanted to meet with him. At Vitale's request, they went for a ride together in the defendant's truck. During this drive, Vitale told Spencer that he was going to beat the case against him because no one saw him deliver the cocaine, and that "Bob [Bruner], out of all the people he dealt with, would be the last one to turn him in to the DEA." The defendant also told Spencer that the "best way * * * to deal in drugs, would be to do it on a one-to-one basis, not use the telephone."

At trial, the defendant testified that he never delivered cocaine to Bruner, although he admitted being at Bruner's house on August 16, 1983. He alleged that he went to Bruner's residence in order to look at some Uzi submachine guns, which he refused to purchase because they were stolen. The defendant also testified that the first time he met Neal Spencer was at Bruner's home, where they discussed sports.

Spencer was called as a rebuttal witness and testified that he met Vitale at a restaurant, and that they discussed a 150 pound marijuana sale, not sports. Spencer also testi-

fied he saw an Uzi submachine gun at Vitale's house, and that the defendant told him he had obtained it from Bruner. This evidence was admitted without objection by defense counsel.

Issues

On appeal the defendant raises five issues: (1) whether the court erred in admitting the post-indictment statements made to Spencer; (2) whether the court erred in admitting evidence of other crimes; (3) whether the court erred in allowing information regarding agreements with government witnesses to be withheld until the weekend before trial; (4) whether the court erred in refusing to order the government to disclose the defendant's oral statements made to Bruner and Spencer; and (5) whether the court erred in submitting the conspiracy count to the jury.

Discussion

A. *Admission of Post-Indictment Statements*

It is well established that government agents cannot deliberately elicit incriminating statements from an accused after he has been indicted, in the absence of his attorney. *See Massiah* v. *United States,* 377 U.S. 201, 206 (1964). To do so would violate the accused's sixth amendment right to counsel. *Id. See also United States* v. *Criswell,* 696 F.2d 636, 639 (8th Cir. 1983).

The appellant's position is that after he was indicted, Spencer, an agent of the government, solicited incriminating statements from him, and that those statements should have been excluded from evidence. We reject the defendant's position.

First, the issue was not properly preserved for appeal because no objection was made at trial to the admission of the testimony. FED. R. EVID. 103; *see United States* v.

Wagoner, 713 F.2d 1371, 1376 (8th Cir. 1983). Furthermore, we cannot say that appellant's claim amounts to plain error under FED. R. CRIM. P. 52(b). *See United States* v. *Price,* 464 F.2d 1217, 1219 (8th Cir.), *cert. denied,* 409 U.S. 1040 (1972). Finally, there is nothing in this case to suggest that the incriminating statements were "deliberately elicited." Rather, the evidence shows that the appellant volunteered the statements to Spencer.

B. *Admission of Other Crimes Evidence*

The appellant further contends that Spencer's testimony regarding the 150 pound marijuana sale, and the Uzi submachine gun, was impermissible evidence of other criminal acts prohibited by FED. R. EVID. 404(b). He alleges that although the testimony was not objected to, the issue is appealable because it is plain error under FED. R. CRIM. P. 52(b).

As stated above, where the admission of evidence is not objected to at trial, the issue is not properly preserved for appeal. *See Wagoner, supra,* 713 F.2d at 1376. As one court has stated:

> Objections caution the opposing party to prevent error and avoid misconduct and alert the court to take corrective action * * * [citation omitted]. The defendant may not allow error to go uncorrected and then ask this court to reverse his conviction.

United States v. *Berry,* 627 F.2d 193, 199 (9th Cir. 1980), *cert. denied,* 449 U.S. 1113 (1981).

As to the merits of this issue, we are not persuaded that the evidence admitted was prohibited by FED. R. EVID. 404(b). Appellant testified that he met Neal Spencer at Bruner's home and discussed sports, and that he would not purchase the Uzi submachine gun from Bruner

because it was stolen. Spencer testified that he met Vitale at a restaurant to conduct a drug deal, and that he had seen an Uzi submachine gun in Vitale's house. This rebuttal testimony directly contradicted Vitale's testimony. "Once a witness (especially a defendant-witness) testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit * * * evidence tending to contradict the specific statement * * *." *United States* v. *Giese*, 597 F.2d 1170, 1190 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979); *United States* v. *Benedetto*, 571 F.2d 1246, 1250 (2nd Cir. 1978). We cannot say that the admission of Spencer's testimony was an abuse of discretion by the district court, or that it amounted to plain error. *See Price, supra*, 464 F.2d at 1219.

C. *Pretrial Discovery of Government Witnesses*

Vitale's next allegation is that the district court erred in failing to order the pretrial disclosure of Spencer, as a government witness, until shortly before trial. Our examination of this issue discloses no basis for relief.

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the government's failure to disclose favorable evidence specifically requested by the accused, violated due process. However, this court has recognized that discovery matters are committed to the sound discretion of the district court, and are reviewable only upon a showing of an abuse of discretion. *See United States* v. *Pelton*, 578 F.2d 701, 707 (8th Cir.), *cert. denied*, 439 U.S. 964 (1978); *United States* v. *Crow Dog*, 532 F.2d 1182, 1189 (8th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977). Furthermore, an error by the district court in administering the discovery rules is reversible only if the error is shown to prejudice the substantial rights of the defendant. *See Crow Dog, supra*, 532 F.2d at 1189.

In this case, the defendant sought a list of all prospective prosecution witnesses who had agreements with the government. The defendant's initial request for this information was made October 7, 1982, prior to his incriminating conversation with Spencer. On October 22, 1982, the government agreed to provide the requested information shortly before trial. On November 17, 1982, Magistrate Bahn ordered the names to be disclosed four days before trial. The district court balanced the competing interest of providing the defendant with the information needed for a full defense, against the need to protect the government witnesses, and upheld the magistrate's recommendation. The government complied with the court's order.

We cannot say that the district court abused its discretion in this regard. *See Crow Dog, supra,* 532 F.2d at 1189. Nor do we believe that any substantial right of the defendant has been prejudiced. *Id.*[2]

D. *Providing Statements made by the Defendant to the Informants*

The appellant claims that the government failed to comply with FED. R. CRIM. P. 16, by not disclosing the substance of the statements made by him to Robert Bruner and Neal Spencer. The rule is clearly not applicable in this case.

Rule 16 requires the government to disclose "the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant

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[2] The government asserts that it became aware of the Spencer-Vitale conversation four days before trial, and that this information was immediately relayed to the defense counsel. Assuming this to be true, no substantial right of the accused was prejudiced. The information sought regarding Spencer was not available until shortly before trial. The district court's order requiring that the names be disclosed shortly before trial cannot be said to have prejudiced the defendant.

whether before or after arrest *in response to interrogation by any person then known to the defendant to be a government agent* * * *." FED. R. CRIM. P. 16(a)(1)(A) (emphasis added). Here, the defendant did not know that Bruner or Spencer were government informants when he made the incriminating statements. Appellant's claim in this regard is, therefore, without merit.

E. *The Conspiracy Count*

The appellant's final claim is that there was insufficient evidence to support a conspiracy charge. In evaluating the sufficiency of the evidence to uphold a verdict, we must view the evidence in the light most favorable to the government, giving the government the benefit of all reasonable inferences which may be drawn. *See United States* v. *Burchinal,* 657 F.2d 985, 996 (8th Cir.), *cert. denied,* 454 U.S. 1086 (1981); *United States* v. *Sullivan,* 618 F.2d 1290, 1295 (8th Cir. 1980).

Vitale contends that the government failed to prove an overt act in furtherance of the conspiracy, and therefore this charge is infirm. The premise for this claim is that the only government witness adduced as to the actual transfer of cocaine, was Robert Bruner, and therefore it is the defendant's testimony against the informant's.

Vitale's argument that his testimony contradicted Bruner's, thereby nullifying its probative value, is without merit. The issue of whether Bruner or Vitale was telling the truth, was a question of credibility for the jury to decide. *See Sullivan, supra,* 618 F.2d at 1295. Bruner testified that Vitale delivered the cocaine to him, and knew it was not for his personal consumption. The jury chose to believe Bruner's testimony, which was sufficient to support the conviction. That determination will not be disturbed.

Conclusion

We have examined the appellant's remaining arguments and find them to be without merit. Accordingly, we affirm his conviction.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

Order of the United States Court of Appeals, Eighth Circuit, denying Appellant's Petition for Rehearing and Rehearing En Banc, March 27, 1984, in UNITED STATES V. JOHN J. VITALE.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

83-1416-EM.
UNITED STATES OF AMERICA,
Appellee,

v.

JOHN J. VITALE,
Appellant.

September Term, 1983

Appeal from the United States District Court for the Eastern District of Missouri

The Court, having considered appellant's petition for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing en banc denied.

March 27, 1984

Office - Supreme Court, U.S.
FILED
AUG 15 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1899

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN J. VITALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether evidence (to which petitioner did not object before or during trial) of petitioner's post-indictment conversation with a government informant, which was initiated by petitioner without government involvement or solicitation, was properly admitted under *Massiah* v. *United States,* 377 U.S. 201 (1964).

2. Whether the government's production of its witness list four days prior to trial, in compliance with the pre-trial order of the district court, violated petitioner's rights under *Brady* v. *Maryland,* 373 U.S. 83 (1963).

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1899

JOHN J. VITALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 728 F.2d 1090.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 1984. A petition for rehearing was denied on March 27, 1984 (Pet. App. A10). The petition for a writ of certiorari was filed on May 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of conspiracy to distribute cocaine and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1)

and 846. He was sentenced to concurrent terms of ten years' imprisonment and a special parole term of ten years. The court of appeals affirmed (Pet. App. A1-A9).

The evidence at trial, which petitioner does not dispute (Pet. 5-7), is summarized in the opinion of the court of appeals (Pet. App. A2-A4). It showed that in August 1982 a confidential informant of the Drug Enforcement Administration (DEA) contacted Robert Bruner to purchase cocaine. On August 16 Bruner spoke with petitioner, who told Bruner that he had two to four ounces of cocaine. When the informant called Bruner later that evening, Bruner said he could not talk then because his "coke man" was there. DEA agents observed that an automobile registered to petitioner was parked outside Bruner's residence at the time.

Petitioner left two ounces of cocaine with Bruner that evening. Bruner later snorted some of the cocaine and discovered that it was of poor quality. He then telephoned petitioner to inform him of the problem. The next day Bruner delivered ten pounds of hashish to the informant, and the two agreed that Bruner would sell the informant one ounce of cocaine later that day. When the men met to consummate the sale, Bruner was arrested.

Upon his arrest Bruner agreed to cooperate with the government. Thereafter, he called petitioner, said he had disposed of the two ounces of cocaine, and asked if petitioner had any more. Petitioner said that he did not but that he was awaiting a delivery. On September 16, 1982, petitioner was indicted for conspiracy and distribution of cocaine.

As a result of Bruner's cooperation, Neal Spencer was arrested on September 20, 1982. Spencer, an acquaintance of petitioner's, agreed to cooperate with the DEA. In November 1982, petitioner called Spencer and, at petitioner's request, they went for a ride together in petitioner's

truck. In the course of their conversation petitioner told Spencer that he was going to beat the pending cocaine case because nobody saw him deliver the drugs and Bruner "would be the last to turn him in to the DEA." Petitioner also suggested that "the best way" to sell drugs was "on a one-to-one basis." At trial Spencer testified, without objection, about their conversation.

In his defense petitioner denied involvement in cocaine. He testified that he went to Bruner's house on August 16 to look at some submachine guns, which he refused to purchase because they were stolen. Petitioner also testified that he first met Spencer at Bruner's house and that they discussed sports. Spencer, recalled as a rebuttal witness, testified without objection that he and petitioner had discussed a marijuana deal rather than sports and that he saw a submachine gun at petitioner's house that petitioner had obtained from Bruner.

ARGUMENT

1. Petitioner contends (Pet. 8-11) that the introduction of evidence of his post-indictment conversation with Spencer violated his Sixth Amendment right under *Massiah* v. *United States,* 377 U.S. 201 (1964). The court of appeals correctly rejected this argument.

First, as the court of appeals noted (Pet. App. A4), this question was not properly preserved in the district court.[1] Petitioner acknowledges (Pet. 9) that no objection was made at trial to the admission of Spencer's testimony, but he argues that he raised the issue in a pre-trial motion that the district court denied. However, as explained in the government's brief in the court of appeals (at 8-9), petitioner's pre-trial motion was directed to the suppression of

---

[1]The court of appeals also stated (Pet. App. A5) that petitioner's claim did not amount to plain error.

certain statements made to Bruner, which the government represented it would not use at trial. Indeed, at the time the motion was filed, the government was unaware of petitioner's conversation with Spencer. Thereafter, when the government learned of their meeting and advised petitioner of its intention to introduce evidence of the conversation, defense counsel did not move to suppress Spencer's testimony or object to its admission at trial. In these circumstances, petitioner failed to preserve the *Massiah* issue for appellate review.[2]

In any event, petitioner's claim is without merit. *Massiah* holds that the government cannot introduce against a defendant "evidence of his own incriminating words, which federal agents had *deliberately elicited* from him after he had been indicted and in the absence of his counsel" (377 U.S. at 206 (emphasis added)). Under *Massiah* the "relevant * * * inquiry * * * [is] whether the Government has interfered with the right to counsel by 'deliberately eliciting' incriminating statements." *United States* v. *Henry*, 447 U.S. 264, 272 (1980). See also 447 U.S. at 276 (Powell, J., concurring) ("*Massiah* does not prohibit the introduction of spontaneous statements that are not elicted by governmental action").

The court of appeals correctly applied "*Massiah*'s 'deliberately elicted' test" (447 U.S. at 271) and concluded (Pet. App. A5) that "there is nothing in this case to suggest that the incriminating statements were 'deliberately elicted.' " Cf. *United States* v. *Franklin*, 704 F.2d 1183, 1189-1192

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[2]Because petitioner did not object either before or during trial, this case does not fall within the rule of *Lawn* v. *United States*, 355 U.S. 339, 353 (1958), that a pre-trial motion to suppress evidence preserves the claim for appeal even in the absence of an objection at trial. See *United States* v. *Contreras*, 667 F.2d 976, 978 n.1 (11th Cir.), cert. denied, 459 U.S. 849 (1982); cf. *United States* v. *Braunig*, 553 F.2d 777, 780-781 (2d Cir.), cert. denied, 431 U.S. 959 (1977).

(10th Cir. 1983); *United States* v. *Malik*, 680 F.2d 1162, 1165 (7th Cir. 1982). Thus, petitioner failed to meet his burden of demonstrating a violation of his constitutional rights. Petitioner's assertions (Pet. 9) that Spencer "deliberately elicted [the] incriminating statements," and that "[i]t was the 'intent' of the police to have [Spencer] obtain statements from [petitioner]," are unsupported by the record and were properly rejected below.[3]

2. Petitioner also contends (Pet. 11-13) that the government's production of its witness list four days before trial, in compliance with the pre-trial order of the district court, violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). Petitioner claims that he was entitled to this material at an earlier (albeit unspecified) point, that such material was "favorable to [him] in that [he] could have effectively negated [the

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[3]As indicated above (see pages 2-3, *supra*), the record shows that petitioner initiated the meeting with Spencer (Tr. 93-98). However, because petitioner failed to raise the issue in the district court, the record was not developed with specific reference to the *Massiah* claim. The government represented in its brief in the court of appeals (at 8 n.1):

> The Government's evidence on this issue [that Spencer was not acting at the direction of the federal agents or attempting to elicit incriminating statements from petitioner] would have been that Spencer had agreed to work for the Government and that he was actively engaged in an investigation of his source of drugs in Indiana during this time period. However, Spencer was never instructed to meet with [petitioner], to converse with him or to attempt to elicit incriminating statements from [petitioner] by any government agent or attorney. The Government was totally unaware, until four days before trial, that Spencer had ever met with [petitioner] after [petitioner's] indictment.
>
> When the Government became aware of this information it was immediately relayed to defense counsel.
>
> Furthermore, the Government's evidence would have been that [petitioner] initiated the contacts with Spencer and that Spencer did not interrogate [petitioner] or intend to elicit incriminating statements from [petitioner].

government's] evidence at trial had he been properly and timely given such information" (Pet. II), and that he was prejudiced by the timing of the disclosure.

These contentions are wholly insubstantial. First, *Brady* applies to the "suppression * * * of evidence" by the government (373 U.S. at 87) and does not establish a constitutional right to pre-trial discovery by the defendant. See *California* v. *Trombetta*, No. 83-305 (June 11, 1984), slip op. 9 & n.8; *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977); *United States* v. *Agurs*, 427 U.S. 97, 109 (1976).[4] In addition, Brady is applicable to "evidence favorable to" the defendant (373 U.S. at 87); the government's list of witnesses does not constitute favorable evidence and hence was not required to be produced under *Brady*. See *Weatherford* v. *Bursey*, 429 U.S. at 559; *United States* v. *Alessi*, 638 F.2d 466, 481 (2d Cir. 1980); *United States* v. *Sukumolachan*, 610 F.2d 685, 688 (9th Cir. 1980); *United States* v. *John Bernard Industries, Inc.*, 589 F.2d 1353, 1357 (8th Cir. 1979).[5] Finally, petitioner has not shown prejudice from the

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[4]To the extent that the district court has discretion to order pre-trial disclosure of *Brady* material — and it is our position that the court has no such authority — the court of appeals correctly noted (Pet. App. A6-A7) that there was no abuse of discretion in this case in declining to order disclosure more than four days in advance of trial.

[5]Contrary to petitioner's argument that a witness list is favorable because it would help the defendant get ready for trial, this Court has recognized that "the impact of the undisclosed evidence on the defendant's ability to prepare for trial" is not the test under *Brady*, "since knowledge of the prosecutor's entire case would always be useful in planning the defense." *United States* v. *Agurs*, 427 U.S. at 112 n.20. See also *California* v. *Trombetta*, slip op. 9 & n.8.

Insofar as petitioner is complaining about the government's failure to make earlier disclosure of any agreements with Spencer, rather than about the witness list in general, no violation of *Brady* occurred. While such information may be favorable impeachment material under *Brady* (cf. *Giglio* v. *United States*, 405 U.S. 150 (1972)), it would not, as discussed above, have to be disclosed prior to trial. Moreover, in this case, the government represented in its court of appeals brief (at 8 n.1,

timing of the government's disclosure and did not seek any relief, such as a continuance, from the district court. Accordingly, no evidence was suppressed from petitioner, and his "right to a fair trial" under *Brady* (*United States* v. *Agurs*, 427 U.S. at 108) was not infringed. See *United States* v. *Hemmer*, 729 F.2d 10, 14 (1st Cir. 1984); *United States* v. *Higgs*, 713 F.2d 39, 44 (3d Cir. 1983); *United States* v. *Kubiak*, 704 F.2d 1545, 1549-1550 (11th Cir. 1983); *United States* v. *Xheka*, 704 F.2d 974, 981 (7th Cir. 1983), cert. denied, No. 83-338 (Nov. 28, 1983); *United States* v. *Kopituk*, 690 F.2d 1289, 1339-1340 (11th Cir. 1982), cert. denied, 461 U.S. 928 (1983); *United States* v. *Smith*, 609 F.2d 1294, 1302-1303 (9th Cir. 1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA CRISCITELLI
Attorney

AUGUST 1984

18; see also Pet. App. A7 & n.2) that it was not itself aware of petitioner's conversation with Spencer until four days before trial and at that point it advised defense counsel of such evidence and of the government's agreement with Spencer concerning his testimony; in addition, Spencer testified on direct examination about his understanding with the government regarding his testimony. The government's disclosure of these matters in advance of trial occurred in full compliance with the pre-trial orders of the district court.